

APPEAL NO. 010867
FILED JUNE 11, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 27, 2001. The hearing officer resolved the issues before him by determining that the appellant (carrier herein) was entitled to zero percent contribution from the respondent's (claimant herein) compensable injury, and consequently, was not entitled to recoupment. The carrier files a request for review arguing that the hearing officer's determination of zero percent contribution was contrary to the evidence. There is no response from the claimant in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable injury on _____ to his lumbar spine at L3-L4, L4-L5, L5-S1, and that the claimant was assigned a 34% impairment rating (IR) as a result of this injury. The parties also stipulated that the claimant sustained a compensable injury to his lumbar spine at L4-L5 on _____. The hearing officer determined the carrier was entitled to zero percent contribution from the 1988 injury stating the following rationale:

Carrier failed to sustain its burden of proof to show that it is entitled to contribution as a result of Claimant's first injury. Claimant was able to work for seven years at heavy manual labor after his first injury, without any medical attention or medication, and without restrictions; the mechanics of the two injuries were completely different; the second injury involved an additional level of Claimant's spine that was normal after the first injury, and the surgeries after the second injury involved a more substantial repair mechanism in the form of fusion cages, resulting in the second injury virtually obliterating the effects of the first injury; and there is no credible or definite medical evidence of what the cumulative effect the first injury had, if any, on Claimant's lumbar range of motion in connection with the second injury.

The carrier argues on appeal that testimony from its peer review doctor, Dr. C, D.O., proved its entitlement to contribution. The hearing officer analyzed Dr. C's testimony in his decision, stating as follows:

The primary basis utilized by Carrier to attempt to sustain its burden of proof to show entitlement to contribution was a peer review by [Dr. C]. [Dr. C] testified by telephone, at the hearing and was Carrier's sole witness. [Dr. C]'s testimony, and report, largely concentrated on pointing out what he perceived as deficits and defects in the Report of Medical Evaluation by Dr.

M, M.D. Unfortunately for the Carrier, as admitted by the Carrier's representative, the [IR] assigned by [Dr. M] had become final prior to the hearing. In addition, the differences between how [Dr. C] would rate Claimant, and the medical evaluation by [Dr. M], can be attributed to differences in professional judgment. Interestingly, though, [Dr. C] did maintain that he could, without ever having examined or even seen Claimant, "estimate the amount of range of motion impairment" that Claimant has sustained from his first injury, which was, by the date of [Dr. C]'s report some 10 years prior.

The present case is very similar to the one under review in our decision in Texas Workers' Compensation Commission Appeal No. 990631, decided May 10, 1999, where we affirmed a hearing officer's finding of zero percent contribution. In Appeal No. 990631 we pointed out that Section 408.084(a) provided that awarding of contribution is not mandatory and that the existence of medical evidence supporting contribution does not require an award of contribution. In Appeal No. 990631, we pointed out that it was the province of the hearing officer as the finder of fact to weigh the evidence, including the medical evidence in resolving factual questions such as the question of cumulative impact.

We affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge